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September 24, 2002

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Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W. TW-A325
Washington, D.C. 20554

SEP 24 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Impact of IXC Bankruptcies on a True-Up: Implementation of the Pay Telephone
Reclassification and Compensation Provisions of the Telecommunications Act of
1996, CC Docket No. 96-128

Dear Ms. Dortch:

This *ex parte* letter demonstrates that, irrespective of the bankruptcy laws, to ensure that independent PSPs are fairly compensated for dial-around calls as required by Section 276(b)(1)(A) of the Act, the Commission must factor the bankruptcies of WorldCom and Global Crossing into its decision regarding whether and how to order a true-up. This letter supplements the Impact of IXC Bankruptcies *Ex Parte*¹ which discussed the impact if IXC bankruptcies on a true-up of dial-around compensation for payphone providers. As explained therein, Section 276(b)(1)(A) of the Act requires the Commission to “ensure” that PSPs are fairly compensated. Ordering a true-up for the Intermediate Period (October 7, 1997 – April 21, 1999), would violate Section 276(b)(1)(A) by *guaranteeing* that independent PSPs would be *unfairly* compensated for dial-around calls.²

In deciding how to order a true-up in light of the IXC bankruptcies, the Commission’s discretion is limited by the Act’s requirement that the Commission must “ensure” that PSPs are fairly compensated for all dial-around calls. The Commission would fail to satisfy the Act’s requirement for fair compensation if it ordered a true-up for both the Interim and Intermediate Periods. Because of their bankruptcies, WorldCom and Global Crossing will not pay independent PSPs the compensation that they would owe for the Interim Period true-up. As a result, in a true-up for both periods, independent PSPs are guaranteed on average to be paid less than the \$.229 per-call rate that the Commission determined was “fair,” and necessary for cost recovery, in the *Fourth Order on*

¹ Impact of IXC Bankruptcies on a True-Up, *Ex Parte* Letter to Marlene H. Dortch, Secretary, FCC, from Albert H. Kramer, Robert F. Aldrich and Robert N. Felgar (September 11, 2002).

² As explained below, however, one way the Commission can order a true-up for both the Intermediate Period and Interim Period (November 7, 1997 – October 6, 1997) is to reallocate IXCs’ responsibility for Interim compensation to those IXCs that remain solvent.

Reconsideration. Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Fourth Order on Reconsideration and Order on Remand, 2002 FCC LEXIS 513 (2002). Ordering a true-up for both the Interim and Intermediate Periods is thus unlawful since it would “ensure” that independent PSPs are *unfairly* compensated for dial-around calls.

The Commission cannot pretend that it is fairly compensating independent PSPs by ordering IXC that the Commission knows will not pay PSPs any compensation to nevertheless pay. As the Impact of IXC Bankruptcies *Ex Parte* explained, the case law clearly provides that an agency cannot ignore reality when engaged in a retroactive rate adjustment. The Supreme Court in *West Ohio Gas Co. v. Pub. Util. Comm’ of Ohio*, 294 U.S. 79 (1935) determined that when an agency prescribes a rate to be applied retroactively, the agency cannot ignore known facts which, if considered, would make it clear that the prescribed rate was unlawful. Similarly, in *Summerfield v. Civil Aeronautics Bd.*, 207 F.2d 200, 204 (D.C. Cir. 1953) the court explained that “when the period under consideration has passed, fair and reasonable rates should be ascertained from what is known and not from a *nunc pro tunc* estimate.” *Id.* at 204 (citing *West Ohio Gas Co.*). It follows that in 1996, the Commission could not have simply ignored the fact that Global Crossing and WorldCom would not pay and pretended as though part of PSP compensation and cost recovery would come from Global Crossing and WorldCom. Similarly, in the instant proceeding, the Commission cannot ignore the IXC bankruptcies which ensure that a true-up for both the Interim and Intermediate Periods would cause independent PSPs to be unfairly compensated for dial-around calls in violation of Section 276(b)(1)(A). As a matter of law under Section 276 of the Act, and irrespective of the intricacies of bankruptcy law, the Commission would be, and is, obligated to ensure fair compensation and cost recovery to PSPs.

APCC has proposed that one possible way for the Commission to factor the bankruptcies into a true-up is to order a true-up for the Interim Period only. Indeed, APCC has demonstrated why this is legally required and is the equitable resolution. There may be other solutions that comport with the requirement that the Commission ensure fair compensation for PSPs. Another possible solution for example, that is consistent with the Commission’s Section 276 obligations, is for the Commission to order a true-up for both periods but reallocate responsibility for compensation for the Interim Period to those IXCs that remain solvent.³ While the Commission has discretion to choose the appropriate

³ It is not uncommon in both the private sector and regulated industries for one user to assume responsibility for the payment obligations of another user. Whenever a rate includes an element for bad debt, that is precisely what occurs. The fact that in this case the Commission can identify the entities responsible for the bad debt, as well as the amount of the bad debt, does not somehow make unfair the requirement that certain IXCs pay for the bad debt of other IXCs.

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vehicle for meeting its statutory responsibility, it cannot shirk the statutory command that it must ensure that independent PSPs are fairly compensated for dial-around calls.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert N. Felgar". The signature is fluid and cursive, with the first name "Robert" and last name "Felgar" clearly distinguishable.

Albert H. Kramer
Robert F. Aldrich
Robert N. Felgar

AHK/mjo

cc: Jeff Carlisle
Linda Kinney
Jordan Goldstein
Matthew Brill
Dan Gonzalez
Jon Stover
Lynne Milne
Craig Stroup
Tamara Preiss
Lenworth Smith
Joel Marcus
John Rogovin